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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD SANCHEZ,

Defendant and Appellant.

C040992

(Super. Ct. No.
01F06674)

A jury convicted defendant Richard Sanchez of two counts of battery on a cohabitant (Pen. Code, § 243, subd. (e)(1)), criminal threats (Pen. Code, § 422), assault (Pen. Code, § 240), and battery (Pen. Code, § 242). The trial court found that defendant had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b), as a result of a prior conviction for inflicting corporal injury on a cohabitant.

Sentenced to four years in state prison, defendant appeals. He contends that evidence of prior domestic violence was improperly

introduced, he was denied effective assistance of trial counsel, and the prosecutor committed acts of misconduct during closing argument. We shall affirm the judgment.

BACKGROUND

The Incident on July 19, 2001

On June 19, 2001, defendant was living with his girlfriend, Tresa Wagner, at her mother's house in Sacramento. Also present in the house that afternoon were Wagner's mother, Wagner's 19-year-old daughter, Melissa, Wagner's son and the son's 16-year old friend, and Wagner's nephew.

While Wagner and defendant were alone in their bedroom, they got into an argument because defendant accused Wagner of wearing "revealing" clothing (a tank top and shorts) in front of the young men in the house and because defendant had refused to give Melissa a cigarette.

Saying that she often had bought cigarettes for defendant, Wagner tried to take one from defendant's pack. But he knocked her onto the bed, slapped her, and then sat on top of her, pinning her chest with his arm.

As defendant began slapping her, Wagner screamed for her daughter, who came into the bedroom and stopped the altercation. Wagner sustained a cut lip and a small facial bruise from the attack. By the time the police arrived and took photographs of Wagner's injuries, defendant was gone. Wagner later told defendant she no longer wanted to be with him. However, when "he persisted with threats," "[she] started seeing him again."

Essentially corroborating Wagner's version of the events, Melissa testified that she was in her bedroom when she heard her mother screaming. The voice sounded "muzzled, like something was covering her mouth." Melissa went to Wagner's bedroom, pushed the door open, and saw defendant and Wagner on the bed. Wagner was on her back, and defendant was sitting on the edge of the bed next to her, kneeling over her and holding her down. Defendant had his forearm on Wagner's chest, one hand on her mouth, and the other hand around her throat. Defendant backed off Wagner when Melissa entered the room. Melissa told defendant to leave, but he refused. So Melissa asked her cousin and his friend to make defendant go away. Defendant finally left about an hour later.

Wagner's mother testified that she was in the living room when she heard Wagner telling defendant "to quit." When Wagner came out of the bedroom, her mouth was bleeding. Wagner asked her mother "to call the cops and get him out of my house."

The Incident on August 21, 2001

On August 21, 2001, Wagner and defendant were at the home of defendant's grandmother, who lived on the same street where the house of Wagner's mother was located. They were there to repair a tire on a bicycle so that defendant could use it as transportation to purchase some methamphetamine.

Wagner had consumed one or two beers that day. She was supposed to wait at the grandmother's house while defendant got the methamphetamine; however, before he left, she told him that she intended to go to her mother's house while he was gone. Defendant reacted by grabbing Wagner's arm and trying to pull her inside

the house. Wagner resisted, falling backwards to the ground. Defendant then sat on top of her, putting one hand on her chest and the other around her throat. He told her that she was a "dead bitch," and Wagner began to scream. Putting his hand over her mouth, defendant warned her to "[s]hut up or you are a dead bitch." When Wagner continued trying to scream, defendant picked up a tire iron and slammed it into, or dropped it onto, the ground next to her head. He finally got up and told Wagner to leave.

Wagner was cut on her arm during the altercation. She told the police that defendant had cut her with a knife. But at trial, she testified that she did not know exactly how her arm was cut. However, Wagner denied that she cut herself, although she had done so in the past as a result of drug use. Police took photographs of her injury.

When officers went to the home of defendant's grandmother to arrest him, they had to force open the door, which had been wedged shut with screwdrivers and knives. They found defendant in the back of the garage.

The Evidence of Uncharged Acts

Wagner testified that she had called 911 on other occasions. Three days before the attack on August 21, 2001, she telephoned 911 because defendant was "threatening and forcing himself into [her] life." Wagner also testified that she had refused defendant's marriage proposal but continued dating him out of fear for her safety and that of her family. While charges against him were pending, defendant repeatedly telephoned Wagner (sometimes two

to three times a day) until the court issued an order preventing him from doing so.

Alicia Marquez, defendant's former common-law wife, testified about defendant's acts of abuse during their relationship. Marquez and defendant have a daughter and had been together for ten years until approximately 1993. During that time, defendant would hit her for many reasons.

Specifically, Marquez testified about an act of domestic abuse that occurred in July 1992 over a period of two days, during which defendant hit her with a pipe on her arms, legs, and back because his "coffee was cold or his toast wasn't ready." Defendant called her "bitch, a dog," told her to "go lay by [her] water dish," and threatened to kill her if she moved. Marques initially did as she was told, but she eventually went to a neighbor's house and called the police.

Marquez also described an event that occurred in October 1993, when defendant had been angry with her because his breakfast was cold. He threatened her with a baseball bat, telling her to get his breakfast right, and then hit her on the back and legs with the bat until he was satisfied with his food. When defendant acted as if he were going to hit her in the head with the bat, Marquez fell to the ground in a fetal position and covered her head with her arms. Defendant went ahead and hit her on the elbow with the bat, blaming her for moving. Marquez sustained bruising to her back, legs, arms, and elbow. She called the police and reported the incident.

Marquez further testified that she, or someone on her behalf, had "frequently" called the police regarding abuse by defendant and that Marquez had sought medical attention on one occasion when defendant threw a Pepsi can at her and broke her collar bone. She did not go to the hospital on other occasions. Despite the violence, Marquez always got back together with defendant until their final separation in 1993. According to Marquez, she had remained with defendant because he said that he would kill her if she left.

DISCUSSION

I

Prior to trial, the prosecutor filed a motion to introduce, pursuant to Evidence Code section 1109, evidence of defendant's prior acts of abuse for the purpose of showing his propensity for domestic violence. (Further section references are to the Evidence Code.) The court ruled that incidents which occurred within the past ten years were admissible.

Although defendant did not object in the trial court to the prior acts evidence, he now claims the authority for the evidence, section 1109, is unconstitutional on its face because it violates due process of law. Because defendant never tendered this claim to the trial court, he may not raise it for the first time on appeal. (*People v. Catlin* (2001) 26 Cal.4th 81, 122; *People v. Bell* (1998) 61 Cal.App.4th 282, 289.)

In any event, defendant acknowledges that the California Supreme Court has upheld the constitutionality of section 1108, whose language mirrors that of section 1109. (*People v. Falsetta*

(1999) 21 Cal.4th 903, 913-915.) By parity of reasoning, this court has rejected a similar due process challenge to section 1109 (*People v. Johnson* (2000) 77 Cal.App.4th 410, 417-420), as have two other Courts of Appeal. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1025-1030.) As stated in *People v. Jennings* (2000) 81 Cal.App.4th 1301, "the constitutionality of section 1109 under the due process clauses of the federal and state [C]onstitutions has now been settled." (*Id.* at p. 1310.)

II

In another attack on the prior acts evidence, defendant argues Marquez's testimony should have been excluded under section 352, which provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

According to the People, defendant has waived a section 352 challenge by failing to object on this ground in the trial court. However, defendant was not required to do so because section 352 was put in issue by the People's motion asking the trial court to rule the evidence admissible under section 1109, which states in pertinent part: "(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to

Section 352.” By its own terms, section 1109 requires the court to conduct the requisite section 352 balancing. Thus, the fact that defendant did not raise a section 352 objection to admission of the prior acts did not constitute a waiver of that issue.

Nevertheless, as we will explain, defendant’s argument fails on the merits.

“The admissibility of evidence of domestic violence is subject to the sound discretion of the trial court, which will not be disturbed on appeal absent a showing of an abuse of discretion.” (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) “We will reverse only if the court’s ruling was ‘arbitrary, whimsical, or capricious as a matter of law. [Citation.]’ [Citation.]” (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

In defendant’s view, Marquez’s prior acts evidence should have been excluded since it was “[u]nduly [p]rejudicial and [c]umulative.” His argument is internally inconsistent and self-defeating.

Defendant claims that Marquez’s testimony should have been “excluded entirety” as cumulative and unnecessary because “the prosecution still had the eye witness identification from the victim Wagner,” as well as her “detailed testimony regarding the charged incident” and defendant’s prior acts of domestic violence.

But in the very next paragraph of his brief, defendant states that he was prejudiced by the admission of Marquez’s prior acts testimony since Wagner’s credibility was questionable and, without Marquez’s evidence, “[t]he jury could have very well disbelieved Wagner’s testimony regarding the charged incident”

Defendant has, therefore, explained to himself precisely why the evidence was *not* cumulative and unnecessary.

Defendant also argues the evidence was unduly prejudicial because “[a]llowing Marquez to testify to [his] prior bad acts which occurred in their relationship ten years prior and beyond, painted [him] as an angry and controlling individual who used intimidation and threats of physical violence to get what he wanted.”

However, “[p]lainting a person faithfully is not, of itself, unfair.” (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) As noted by California’s Supreme Court, “[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. ‘[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is “prejudicial.” The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. . . .’ [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Marquez’s prior acts testimony was not evidence that uniquely tended to evoke emotional bias against defendant as an individual and that had very little effect on the issues. To the contrary, “[t]he propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great

likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. . . .'" (*People v. Hoover, supra*, 77 Cal.App.4th at pp. 1027-1028, quoting Assem. Com. on Public Safety, Rep. on Sen. Bill No. 1876 (1995-1996 Reg. Sess.) June 25, 1996, pp. 3-4.)

Under the circumstances of this case, the trial court acted reasonably in concluding that the probative value of Marquez's prior acts testimony outweighed any prejudice to defendant within the meaning of section 352.

According to defendant, the court did not actually perform the requisite weighing under section 352. However, the record does not support this claim.

"[W]hen ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 213; see also *People v. Taylor* (2001) 26 Cal.4th 1155, 1169.)

Here, the trial court considered the People's argument made in their written motion and during oral argument. The People's argument set forth the court's responsibility to perform the requisite weighing of probative value and prejudice. In response to the motion, the court ruled that "evidence of the acts occurring within the 10-year period before the charged offense" would be admissible. The court specifically acknowledged the section 352

standard set forth in the People's written motion, referring to it as the "interest of justice standard" (which the prosecutor defined as weighing probative value and prejudicial effect during oral argument). Balancing these factors, as well as remoteness in time, the court limited the admission of prior domestic violence to that occurring within the past 10 years, although the prosecutor had requested the People be allowed to go beyond that time frame.

This shows the trial court understood its responsibility under section 352 and fulfilled it. There was no abuse of discretion.

III

Defendant next contends defense counsel was constitutionally ineffective for not objecting to evidence of defendant's prior domestic abuse that occurred beyond the 10-year period ruled admissible by the trial court.

The evidence of which defendant now complains consists entirely of a single sentence in which Marquez mentioned that the abuse had been going on "for years" before the July 1992 incident. This testimony came out as follows: When Marquez explained that, in July 1992, defendant had told her to go lie by her water dish and threatened to kill her if she moved, the prosecutor asked, "[H]ow long had this treatment been going on where he hit you with the pipe and wouldn't let you leave?" Marquez responded, "It had been going on for years already." The prosecutor then clarified the question by asking, "But that particular?" "That day?" asked Marquez. "That particular time when you called the police," responded the prosecutor. Marquez then said, "It was two days."

Defendant's trial counsel did not object to this inadvertently nonresponsive testimony that the abuse had "been going on for years," which indirectly brought in evidence of prior domestic violence beyond the 10-year period ruled admissible by the court.

Even when there is a legal basis for an objection, objections are a matter of trial tactics, and counsel's tactical decisions are accorded substantial deference. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) Thus, in order for a defendant to prevail on an ineffective assistance of counsel claim on direct appeal, the record must affirmatively show the lack of a rational tactical purpose for the challenged act or omission. (*Ibid.*)

Defendant again defeats his own argument by providing, in his reply brief, a rational reason why trial counsel may have chosen not to object to Marquez's passing comment. As explained by his appellate attorney, an objection "would have been futile" since "[a]ny objection or curative admonition would not have 'unrung the figurative bell.'" While an admonition may not have been futile, trial counsel reasonably could have chosen not to call attention to Marquez's statement by objecting and requesting that the response be stricken from the record (which would have "rung the bell" again). We will not second-guess such trial tactics on appeal.

IV

Lastly, defendant assigns prosecutorial misconduct to three statements made by the prosecutor during closing argument.

A

During argument, the prosecutor attempted to foreclose any attack on Marquez's credibility based on the fact that the police came out on a few occasions and did not see any injuries on her. The prosecutor argued: "Well common[] sense for all of you with your life experiences tells you that you can get hit and you may not have a visible injury. And somebody who is adept at hitting knows where to hit. If you believe anything Alicia Marquez told you, he knows where to hit."

Defense counsel objected on the ground that this was "going too far." The objection was overruled.

Defendant now contends the argument was misconduct because it lacked evidentiary support and consisted of speculation and personal opinion. We disagree. Marquez testified that defendant usually hit her on her legs and arms because he did not want to leave bruises on her face that people could see. Moreover, she testified defendant had told her that, without visible injuries on her face, he could just say she had fallen and the battery could not be proven. Consequently, the prosecutor's statements were a fair comment on the evidence and inferences therefrom. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) Moreover, they were an legitimate comment on matters of common knowledge or experience. (*Ibid.*)

In passing, defendant claims the argument was misconduct since it "appealed to the passion of the jurors" by "portray[ing] [him] as a monster to the jury who physically beats women after careful deliberation as to where to hit them in order to inflict damage not

visible to the naked eye.” However, he fails to support this claim with any authority. Therefore, we need not address it any further (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [reviewing court may disregard contentions perfunctorily asserted without development]) other than to say that it was a fair comment on the evidence.

B

Next, defendant cites the following comment by the prosecutor during argument to the jury: “You saw Ms. Wagner, and you saw Ms. Marquez. Those ladies were chosen by Mr. Sanchez. They are the same type of people. . . . There is a reason why both of them are the same type of people, and there is a reason why they were both victimized. Because that is who he is.”

Defense counsel objected to the “who he is” comment, but the objection was overruled.

Defendant makes no discernable argument on appeal as to why the prosecutor’s statement was objectionable. He fails to present any argument, supported by legal authority, undermining the court’s ruling, which appears to be correct. Accordingly, he has waived any claim of error. (*People v. Gurule* (2002) 28 Cal.4th 557, 619; *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1159.)

C

Finally, defendant contends the following statement made by the prosecutor impermissibly shifted the burden of proof to defendant: “So while the constitution provides every man, every woman in this country with the right to a defense, with the right

to a trial, and there is nothing wrong with that, but when somebody exercises their constitutional rights they may have a jury trial, they may have the representation of an attorney, that doesn't mean that they have a valid defense."

Defense counsel's objection and request for the "correct instruction" was overruled.

To establish prejudice compelling reversal due to prosecutorial misconduct in the form of statements to the jury, a defendant must show a reasonable likelihood that the jury understood or applied the statements in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970.) The reviewing court must consider the statements in the context of the prosecutor's entire argument (*People v. Dennis* (1998) 17 Cal.4th 468, 522) and may not "'lightly infer' that the jury drew the most damaging rather than the least damaging meaning from [those] statements." (*People v. Frye, supra*, 18 Cal.4th at p. 970.)

The defense in this case was based on the position that the women in defendant's life had a habit of using 911 as a sort of free intervention tool. Defense counsel argued that "poor women" like Wagner and Marquez "don't call 911 because the man did everything that [he is] accused of in a case like this, they call 911 because they want to get him out [of the house] until things calm down." To bolster this argument, defendant elicited evidence that Wagner had called the police several times in the past, sometimes when she was intoxicated, and that the police had observed no visible injuries when they responded to those calls. Defendant also argued that Wagner was intoxicated on August 21,

2001, and, again, had no visible injuries other than the cut on her arm that she could not explain.

To rebut this position, the prosecutor argued that, just because there were no visible injuries on Wagner, this did not necessarily mean nothing had happened. The prosecutor emphasized there was no evidence that nothing had happened on prior occasions (even when there was no visible injury) and there was no evidence that Wagner had been intoxicated on the occasions when the police were called. It was in this context that the prosecutor made the statement of which defendant now complains.

We find no reasonable likelihood that the jury construed or applied the prosecutor's remarks as an attempt to shift the burden of proof, as opposed to a permissible comment on the evidence put forward by the defense. We do not read the prosecutor's comments as implying that defendant had the burden of proving his innocence. The veracity of the witnesses was critical to this trial, and the prosecutor merely was commenting that defendant's explanation for Marquez's and Wagner's repeated calls to 911 was untenable.

D

For the reasons stated above, the three statements of which defendant complains did not constitute prosecutorial misconduct.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

DAVIS, J.

ROBIE, J.